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Supreme Court, U.S.
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In the
Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 309

DONALD P. TULLOCH,
PETITIONER,

v.

JOHN VON UTTER, JR.,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Opinions Below

The opinion of the court below (App. A) is not yet reported. The opinion of the district court (App. B) is reported at 304 F. Supp. 1055..

Jurisdiction

The judgment of the court below was entered on May 14, 1970. A timely petition for rehearing was denied on May 28, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether, in the circumstances of this case (a federal habeas corpus proceeding brought under the provisions of 28 U.S.C. 2241 et seq.), the district court erred in not remanding the cause to the state courts for the purpose of conducting a limited probable cause hearing relative to the validity of a seizure of narcotic drugs from respondent's automobile.

2. Whether, in the circumstances of the case, the court below erred in applying the "fruit of the poisonous tree" doctrine, since there was no evidence of illegality on the part of law enforcement officers.

Statement

After a non-jury trial, respondent John Von Utter, Jr., was convicted in the Superior Court of Barnstable County on five counts charging possession of narcotics in violation of the Narcotic Drug Laws (Mass. Gen. Laws, c. 94). He was sentenced to confinement for one year in the Barnstable House of Correction.[1] The Massachusetts Supreme Judicial Court affirmed the conviction. *Commonwealth* v. *Von Utter*, 1969 Mass. Adv. 559. Respondent thereafter filed a petition for a Writ of Habeas Corpus in the United States District Court for the District of Massachusetts (R. 2-7).[2] On October 10, 1969, the district court ordered petitioner discharged from custody subject to a new trial (R. 27) (App. 21-26). *Von Utter* v. *Tulloch*, 304 F. Supp. 1055 (D. Mass. 1969). The court below affirmed the judgment of the district court (App. 14-20).

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[1] He also received a suspended sentence of from five to seven years.

[2] References are to the Appendix filed in the court below ("R."), and to the appendix to this petition ("App.").

The district court ordered petitioner's discharge on the ground that an affidavit in support of a search warrant was legally insufficient, and thus, that the evidence used at trial was illegally seized. With respect to that search warrant, the evidence at trial showed that on or about March 14, 1968, Sergeant Meads, who was assigned to the Narcotics Division of the Provincetown Police Department filed an application for a search warrant in the Second District Court of Barnstable.[3] In a supporting affidavit, Sergeant Meads alleged that—based upon reliable information—there was probable cause to believe a search of petitioner's automobile would reveal a quantity of marihuana (R. 14-15). Attached to the affidavit was a memorandum setting forth the basis of his belief. That memorandum stated in full (R. 16):

1. Information received from a confidential informant who is an admitted user and is known by me personally to associate with convicted narcotic users, and the informant admittedly associates with convicted users, who have past convictions for narcotic violations, and who has a user's knowledge of narcotics.

2. Information received by me from Detective Robert Silva, who has information from a reliable informant as to dates of parties and names of persons in attendance to conform with the same type of information received from my confidential informant.

3. And information received from State Police Connecticut Narcotics Agents; Trooper Hall and Trooper Rey-

[3] The trial testimony was not transcribed. The evidence related herein comes from the pleadings and admissions in the district court.

nolds that John Joseph Von Utter is known to associate with convicted narcotic users.

4. Information from my confidential informant that John Joseph Von Utter will be operating a white VW 2 door sedan, Connecticut registration JJVU in Provincetown sometime between March 8-10, 1968 and will be containing a quantity of Marihuana, a Narcotic Drug and a quantity of Hallucinogenic Drug known as LSD (lysergic acid diethylamide).

5. All of the information received by me from my confidential informant has been confirmed by Narcotics Agents of the Massachusetts State Police and Connecticut State Police regarding the reputation of John Joseph Von Utter and the cars owner and description, color, registration number.

Mixture or preparation of such plant, its seeds or resin, And illegally kept or concealed: Narcotics, to wit: lysergic acid diethylamide, a Hallucinogenic narcotic drug as described in section 197 of Chapter 94, commonly known as LSD.

On the basis of the affidavit and memorandum attached thereto, a search warrant was issued by the court (R. 17-18). On March 16, 1968, the warrant was executed, and recovered pursuant thereto was a quantity of marihuana, narcotic drugs, and assorted narcotic paraphernalia (R. 18-19).

On April 15, 1968, respondent filed a pre-trial motion to suppress in the Barnstable County Superior Court (R. 19-20). After a hearing—at which the Commonwealth supported the search on the basis of the warrant—Judge Hudson denied the motion on the ground that the affidavit in

support of the application for a warrant was legally sufficient. The Massachusetts Supreme Judicial Court—on appeal—likewise found the supporting affidavit legally sufficient.

2. In preparing his return to the petition for a writ of habeas corpus filed in the district court, the following circumstances surrounding respondent's eventual arrest and the search came to the petitioner's attention: After the warrant here in question was issued, respondent's automobile was placed under surveillance by the Provincetown police. Thereafter, as respondent and a co-defendant[4] left a drug store in the direction of the automobile, they were approached by police officers. Respondent was advised that they had a warrant authorizing a search of his automobile. Respondent replied that there was no need for them to conduct the search—that he would voluntarily empty the contents of the glove compartment. Respondent then grabbed a quantity of contraband from the glove compartment and fled. He was immediately apprehended and returned to the automobile. During a scuffle at the time of his apprehension, a quantity of contraband was dropped through a drain grate. After respondent's return to the automobile, the contraband was removed from the drain grate, and the remaining contraband was removed from his automobile.

In view of these developments, petitioner argued in the district court, as well as the court below, that—even assuming the invalidity of the warrant—the search could properly be considered valid as incidental to respondent's lawful arrest. Petitioner accordingly argued that—if the warrant were held insufficient—the cause be remanded to the state courts for an evidentiary hearing with respect to this alternative theory. The district court first found

[4] The co-defendant was acquitted at trial.

the warrant to be invalid under this Court's holding in *Spinelli* v. *United States*, 393 U.S. 410. The court further rejected the argument that the cause should be remanded to the State Courts for a limited probable cause hearing. It assumed the warrantless arrest to be proper, but found it " * * * doubtful whether at the time of the arrest the car was within the narrowly circumscribed area to which a search incidental to an arrest may be lawfully extended. *Chimel* v. *California*, 395 U.S. 752 [footnote omitted]." The court further held that—even assuming the validity of the alternative theory—the relief sought by petitioner was foreclosed by this Court's holding in *Giordenello* v. *United States*, 357 U.S. 480. The court below—for reasons more fully discussed *infra* (pp. 11-12)—did not decide this latter issue.

Reason for Granting the Writ

1. This case presents an important and far-reaching question dealing with the proper administration of the Federal Habeas Corpus Act (28 U.S.C. 2241 et seq.) which should be finally decided by this Court. The ever increasing case load dealing with federal habeas corpus petitions has been fully documented elsewhere,[5] and need not be repeated here. Suffice to say that federal habeas proceedings have become an accepted course of review of state court convictions, and nothing in the foreseeable future indicates a retreat from that trend.

With this in mind, it seems convincingly clear that procedural guidelines must be developed which—while recognizing the purpose of Federal Habeas Corpus Act—does

[5] E.g., Director of the Administrative Office of the United States Courts, Annual Report (1968). As that statistical report shows (p. 130), 1903 petitions for writs of habeas corpus were filed in 1963. Just five years later (1968), 6300 such petitions were filed, representing an increase of some 286 per cent in that short time.

not do so in a manner which *needlessly* places an undue burden on the states' clearly defined interest in the orderly administration of criminal justice.

In our view, the present case typifies a *needless* interference with the state interests involved. The interference was *needless* because the penalty imposed upon the Commonwealth of Massachusetts—i.e., a re-trial instead of a limited probable cause hearing—served no recognizable or legitimate interest for the respondent.

A. The district court was of the view that the limited relief sought by petitioner—i.e., a remand to the state trial court for a limited hearing on the validity of the search independent of the warrant—was foreclosed by this Court's holding in *Giordenello* v. *United States*, 357 U.S. 480. In our view, *Giordenello* is clearly distinguishable. In that case—brought before this Court on direct review by way of a petition for a writ of certiorari—this Court rejected a suggestion by the government that the case be remanded to the district court for a probable cause hearing. The distinction between that case, however, and the present one, is readily distinguishable. In *Giordenello*, the case was before the Court seeking direct review. In the present case, respondent collaterally attacked his conviction by way of a petition for a writ of habeas corpus. The function of the petition for a writ of habeas corpus differs from that of appellate review. As noted by this Court (*Townsend* v. *Sain*, 372 U.S. 293, 311-312):

> The whole history of the writ—its unique development—refutes a construction of federal courts' habeas corpus powers that would assimilate their task to that of courts of appellate review. The function on habeas is different. It is to test by way of an original civil proceedings, independent of the normal channels of review of criminal judgments, the very gravest allega-

> tions. State prisoners are entitled to relief on federal habeas corpus only upon proving that their detention violates the fundamental liberties of the person, safeguarded against by state action by the Federal Constitution.

From the above language, we think this much is clear. In seeking relief by way of habeas corpus, a petitioner must prove, not that the state judgment—i.e., in this case, the judgment of the Massachusetts Supreme Judicial Court to the extent that it upheld the search on the basis of the warrant—is invalid, but that his *detention* is illegal. In the present case, it was thus incumbent upon respondent to show, not only that the warrant was invalid, but also that the search itself was invalid. Of course, since the Commonwealth initially rested upon the validity of the warrant throughout the state courts, respondent made out a *prima facie* case by showing the invalidity of the warrant. That should not, however, have foreclosed the petitioner—in this independent civil proceeding—from showing that the search was justified on other grounds. It is thus our view that nothing in *Giordenello* precluded the relief sought in this case.

Indeed, in our view, this Court has already indicated the inapplicability of the *Giordenello* rationale in proceedings designed to collaterally attack judgments of conviction.

In *Jackson* v. *Denno*, 378 U.S. 368, a case which reached this Court seeking direct review of a federal district court's denial of a petition for a writ of habeas corpus, this Court held that a defendant is entitled to an independent judicial determination as to the voluntariness of a confession prior to its submission to the jury. This Court rejected the petitioner's argument, however, that he was entitled to a new trial because of the original trial court's failure to make that independent determination. It in-

stead remanded to the state court for a limited hearing on the voluntariness of the confession. See also, *Boles* v. *Stevenson*, 379 U.S. 43, 45-46; *Ellis* v. *Fitzharris*, 407 F.2d 799, 804 (C.A. 9). Although it may be argued that the procedure was warranted in that case because this Court set forth a new standard, it is our view that *Jackson* goes much deeper. In announcing its disposition in that case, this Court referred to *Rogers* v. *Richmond*, 365 U.S. 534. In the *Rogers* case—which raised the validity of a standard used by the trial judge in considering the voluntariness of a confession—this Court rejected an argument by the State of Connecticut that it should be permitted to show the voluntariness of the petitioner's confession at an evidentiary hearing in the *federal* court. In *Jackson*, however, this Court noted a distinction, stating (378 U.S. at 394, n. 22):

> In *Rogers* v. *Richmond*, *supra*, the Court upon finding that the state trial judge applied a wholly erroneous standard of voluntariness, ordered a new trial. But the alternative disposition urged and rejected in that case was an evidentiary hearing in the Federal District Court. It does not appear that the Court considered the possibility of a more limited initial hearing in the state court with a new trial dependent upon the outcome of the hearing.

In these circumstances, it is clear that the *Giordenello* rationale is not applicable, and the district court erred in denying the relief requested by petitioner on the basis of that case. Cf. *Boles* v. *Stevenson*, 379 U.S. 43, 45-46; *Ellis* v. *Fitzharris*, 407 F.2d 799, 804 (C.A. 9); *Lee* v. *State of Alabama*, 386 F.2d 97, 108 (C.A. 5).

B. At all events, it is our view that this Court should reconsider its holding in *Giordenello*—at least to the extent

that the rationale of that case may, if at all, be applicable to proceedings brought under the provision of 28 U.S.C. 2241 et seq. Stripped to its essentials, the rationale of that case does nothing to advance the purposes of the Fourth Amendment exclusionary rule, or any other fundamental right secured to an accused. It is one thing to say that the societal interest of bringing criminal offenders promptly to the book must yield because the constable has "blundered" in securing evidence of a crime. That, of course, is the long and short of the exclusionary rule—to deter similar unlawful action in the future. But it is quite another thing to say that this societal interest must suffer because the prosecutor has made an error of judgment[6] — in this case, an error of judgment which presumedly was shared by the trial justice and the full bench of the Massachusetts Supreme Judicial Court. Crowded dockets have already caused a backlog of criminal cases throughout the Commonwealth of Massachusetts. No relief is presently in sight. To require the Commonwealth of Massachusetts to bear the time and expense of a trial *de novo*, instead of a limited probable cause hearing dealing with the facts and circumstances surrounding the search and seizure, does nothing to advance the cause of the Fourth Amendment, but simply adds to the already crowded dockets. In these circumstances, the approach suggested by the district court —i.e., discharge from custody subject to a retrial—finds

[6] In the court below, respondent suggested that since the Commonwealth of Massachusetts voluntarily chose to rely upon the warrant, it should not now be heard to complain. Respondent's characterization of the Commonwealth's choice as volitional, however, finds more substance in semantics than it does in fact. Of course the prosecutor chose to rely upon the warrant! But that was after the trial justice had already ruled that the warrant was valid. In truth and fact, it is a rare prosecutor who, after obtaining a favorable ruling, and who is mindful of crowded dockets, would challenge that ruling by suggesting an alternative theory which would justify the holding.

no rhyme nor reason in the proper administration of criminal justice, and should be finally rejected by this Court.

2. As stated above, the court immediately below did not pass upon this question. It instead held (App. 20):

> In view of the foregoing, the Commonwealth's attempt to support the seizure as a search incident to a lawful arrest does not require extended discussion. According to the Commonwealth the police officer approached Von Utter as he was coming out of a drug store and told him they had a warrant to search his car. He said there would be no need; he would do it himself. Thereupon he reached into the glove compartment, seized some contraband from it and fled on foot. The police gave chase, apprehended him and placed him under arrest. Thereafter they searched the car and found a quantity of narcotics.
>
> On the record this is not a case where an arrest can be upheld on an independent showing of probable cause, even though the warrant turns out to be invalid. See, e.g., *United States* v. *White*, 342 F.2d 379, 381 (4th Cir.), cert. denied, 382 U.S. 871 (1965); *Williams* v. *United States*, 273 F.2d 781, 790 (9th Cir.), cert. denied, 362 U.S. 951 (1960). Here the evidence in support of the Commonwealth's alternative contention, the action of the defendant, was initially tainted by the invalid search warrant. That defect was not remedied by what occurred afterwards. Cf. *Wong Sun* v. *United States*, *supra*.

In our view, the court below clearly misconstrued the nature and scope of the so-called "taint" or "fruit of the poisonous tree" doctrine. As we read the relevant decisions of this Court (e.g., *Silverthorne Lumber Co.* v. *United*

States, 251 U.S. 385; *Nardone* v. *United States*, 308 U.S. 338; *Wong Sun* v. *United States*, 371 U.S. 471), the purpose of the "fruit of the poisonous tree" doctrine is—consistent with the aims of the exclusionary rule—to preclude the state from indirectly benefitting from an illegal act carried out by an agent of the state. To trigger application of that doctrine, two factors must first coalesce: First, there must be a primary illegality. Secondly, there must be some showing of a causal relationship between the primary illegality and the evidence sought to be suppressed.

In the present case, there is no evidence of the first factor—i.e., a primary illegality. To be sure, the officer was in possession of a warrant which was, two courts later, found to be invalid because the supporting affidavit did not properly set forth facts showing the existence of probable cause. Moreover, as the court below noted, the officer confronted the respondent with this invalid warrant. But neither factor, standing alone, or considered together, established the commission of an illegal act. The confrontation did not amount to an illegal arrest. Nor did it violate any other constitutional or statutory guarantee. In these circumstances, the "taint" or "fruit of the poisonous tree" doctrine clearly was not applicable, and, the court below erred in applying it in the circumstances of this case.

Conclusion

In short, application for writs of habeas corpus under the provisions of 28 U.S.C. 2241, et seq. have increasingly become an accepted mode for reviewing state court convictions. As this trend increases, procedural guidelines must be developed to make those proceedings fully compatible with the obvious interests of the several states in the orderly administration of criminal justice. Remand-

ing a case to the state courts for a limited hearing fully serves the interests asserted by the accused and society alike. It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Southern District.

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 7471.

JOHN VON UTTER, JR.,
PETITIONER, APPELLEE,

v.

DONALD P. TULLOCH,
RESPONDENT, APPELLANT,

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

Lawrence P. Cohen, Assistant Attorney General, with whom *Robert H. Quinn*, Attorney General, *John Wall*, Assistant Attorney General, Chief, Criminal Division, *Edmund Dinis*, District Attorney, and *Peter B. Gay*, Assistant District Attorney, were on brief, for appellant.

Mitchell Benjoya, with whom *Kevin M. Keating* and *Crane, Inker & Oteri* were on brief, for appellee.

May 14, 1970.

McENTEE, *Circuit Judge*. Petitioner Von Utter was convicted in Masachusetts Superior Court for possession of narcotics in violation of the narcotics drug laws. The narcotics were seized in a search of his car pursuant to a search warrant issued to a Provincetown police officer. Petitioner's motion to suppress the evidence on the ground that the application for the warrant did not allege facts constituting probable cause was denied and his conviction was subsequently upheld by the Supreme Judicial Court. *Commonwealth* v. *Von Utter*, 1969 Mass. Adv. Sh. 559. Thereafter, Von Utter filed the instant petition for a writ

of habeas corpus. In the district court, the Commonwealth, in addition to arguing the validity of the search warrant, attempted for the first time to support the seizure on the ground that it was a search incident to a lawful arrest. Although it did not ask for a decision on the merits, it did seek a remand of the case to the state court for an evidentiary hearing. The Commonwealth appeals from the order of the district court discharging the petitioner from custody.

I

The search warrant was accompanied by an affidavit and a memorandum setting forth the basis for the affiant's belief that a search of the petitioner's car would reveal quantities of LSD and marijuana. The memorandum, to the extent relevant, appears in the margin.[1]

In *Spinelli* v. *United States*, 393 U.S. 410 (1969), the Court elaborated on the test to be applied in judging the validity of search warrants where the information set out

[1] "1. Information received from a confidential informant who is an admitted user and is known by me personally to associate with convicted narcotic users, and the informant admittedly associates with convicted users, who have past convictions for narcotic violations, and who has a user's knowledge of narcotics.

2. Information received by me from Detective Robert Silva, who has information from a reliable informant as to dates of parties and names of persons in attendance to conform with the same type of information received from my confidential informant.

3. And information received from State Police Connecticut Narcotics Agents, Trooper Hall and Trooper Reynolds that John Joseph Von Utter is known to associate with convicted narcotic users.

4. Information from my confidential informant that John Joseph Von Utter will be operating a white VW 2 door sedan, Connecticut registration JJVU in Provincetown sometime between March 8-10, 1968 and will be containing a quantity of Marijuana, a Narcotic Drug and a quantity of Hallucinogenic Drug known as LSD (lysergic acid diethylamide).

5. All of the information received by me from my confidential informant has been confirmed by Narcotic Agents of the Massachusetts State Police and Connecticut State Police regarding the reputation of John Joseph Von Utter and the cars, owner and description, color, registration number:"

in the affidavit is based in part on hearsay. The Court began by reaffirming the two-pronged test announced in *Aguilar* v. *Texas*, 378 U.S. 108, 114 (1964), that "the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' or his information 'reliable'." The Court went on to hold, however, that where the affidavit falls short of this standard, the magistrate can go beyond the informer's tip and consider whether it and any other corroboratory information in the affidavit are sufficiently detailed "so that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's reputation." *Spinelli*, *supra*, at 416. The Court cautioned that *Aguilar's* standards must nonetheless inform the magistrate's decision. Thus, in order to find probable cause, the magistrate must be satisfied that the information disclosed by the informant, coupled with any other information contained in the affidavit, is at least as trustworthy as the informer's tip would need to be to stand alone under *Aguilar*.

Following the format prescribed in *Spinelli*, we began by assessing the weight to be attributed to the informer's tip apart from the rest of the affidavit. It is apparent that the tip is deficient when measured by *Aguilar's* standards. On the issue of the informer's reliability, the affiant did not represent that he had had any prior contact with the informer or that the latter had provided the authorities with accurate information in the past. Rather, he attested that the informant was an admitted user, had a user's knowledge of narcotics, and was known by the affiant personally to associate with convicted users. This description

could fit any addict picked up by the police for a narcotics violation. Narcotics informants do not enjoy a reputation for veracity. *Jaben* v. *United States*, 381 U.S. 214, 224 (1965); *Jones* v. *United States*, 266 F.2d 924, 928 (D.C. Cir. 1959). Lacking corroboration,[2] information from so untested a source is unacceptable. *See Wong Sun* v. *United States*, 371 U.S. 471, 480 (1963); *United States* v. *Elgisser*, 334 F.2d 103, 110 (2d Cir.), *cert. denied*, *Gladstein* v. *United States*, 379 U.S. 879 (1964); *United States* v. *Brennan*, 251 F.Supp. 99, 103-104 (N.D.Ohio 1966).

Nor does the tip satisfy *Aguilar's* other test: there is no indication as to how the informant came by this particular information. The fact that the informant is known to associate with convicted users is insufficient to establish how he knew that one John Von Utter would have narcotics in his possession at a certain time and place. *Cf. McCray* v. *Illinois*, 386 U.S. 300 (1967). To paraphrase *Spinelli*, "We are not told how the . . . source received his information — it is not alleged that the informant personally observed [Von Utter] at work or that he had ever [bought narcotics from] him. Moreover, if the informant came by the information indirectly, he did not explain why his sources were reliable." *See Saville* v. *O'Brien*, 420 F.2d 347 (1st Cir. 1969).

We must, therefore, deal with the question of whether

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[2] In *Jones* v. *United States*, 362 U.S. 257, 271 (1960), the Court, in sustaining an affidavit based on an informant's tip, said:

> "Thus we may assume that Didone had the day before been told, by one who claimed to have bought narcotics there, that petitioner was selling narcotics in the apartment. Had that been all, it might not have been enough; but Didone swore to a basis for accepting the informant's story. The informant had previously given accurate information. His story was corroborated by other sources of information. And petitioner was known by the police to be a user of narcotics. Corroboration through other sources of information reduced the chances of a reckless or prevaricating tale; that petitioner was a known user of narcotics made the charge against him much less subject to scepticism than would be such a charge against one without such a history."

the facts set out in the informant's tip augmented by information supplied by the police could lead a magistrate reasonably to believe that the information was reliable, was not derived from a casual rumor, or was not based merely on Von Utter's general reputation. *Spinelli, supra,* at 416. The detailed facts supplied by the informer are that Von Utter would arrive in Provincetown between March 8-10, driving a white VW 2 door sedan with Connecticut registration JJVU, and that the car would contain marijuana and LSD.

These facts bear a superficial resemblance to those in *Draper* v. *United States,* 358 U.S. 307 (1959), in which the Court upheld a search incident to arrest on information supplied by an informant that Draper had gone to Chicago the previous day and that he would return by train with three ounces of heroin on one of two specified mornings. In addition, however, he described in meticulous detail the clothes Draper would be wearing, his habitual tendency to walk fast and the fact that he would be carrying a tan bag. As stated by the Court in *Spinelli, supra,* at 417, "a magistrate, when confronted with such detail, could reasonably infer that the informant had gained his information in a reliable way." We are of the opinion that the detail set forth in the instant informer's tip is insufficient to permit a magistrate to infer that the informant spoke from personal observation or other particular knowledge of the criminal activity. There are obvious qualitative and quantitative differences between this information and that furnished in *Draper.* Most telling is the fact that although the informant reported that Von Utter would be in Provincetown between March 8-10, the application for the warrant was not made until March 14. We think the instant case bears a stronger resemblance to *Spinelli* itself, where the informer supplied information that the defendant was

using two telephones, described by number, and that these phones were being used to conduct illegal gambling operations. The Court held that "this meagre report could easily have been obtained from an offhand remark heard at a neighborhood bar."[3]

Nor is the deficiency remedied by any other information contained in the affidavit. The sum total of that intelligence is that a "reliable" informant had given Detective Silva the names of persons attending parties on stated dates which conformed with "the same type of information" received by the affiant's informant; that Von Utter was known by the Connecticut State Police to consort with convicted narcotic users; and that Von Utter's "reputation" and the description of his car had been confirmed by the state police. The information supplied by Detective Silva's informant is too vague to be of any value, and the mere assertion that an individual is "known" to be a criminal or to associate with criminals has been held inadequate to supply additional weight to otherwise insufficient allegations. *Spinelli, supra,* at 419. Notably, the affiant does not even disclose whether or not the car had arrived as predicted. The only conclusion that can be drawn is that this document falls short of the constitutional standard.

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[3] Compare the extent of the detail in the informer's report in *United States* v. *Repetti*, 364 F.2d 54, 56 (2d Cir. 1966):

> "Appellant was arrested after an informant, who had proved reliable on twenty-five prior occasions, told an agent of the Federal Bureau of Narcotics that a man named Paul, white, five feet, four inches tall, weighing one hundred ten pounds, thin with a prominent nose, driving a customized black Mercury, bearing New York registration number 9T 4041, would be delivering an ounce of heroin at 135th Street and Fifth Avenue at five o'clock in the afternoon of August 2, 1963. Federal narcotics agents were posted at the place referred to by the informant. At five o'clock appellant drove up in an automobile fitting the informant's description."

II

In view of the foregoing, the Commonwealth's attempt to support the seizure as a search incident to a lawful arrest does not require extended discussion. According to the Commonwealth the police officers approached Von Utter as he was coming out of a drug store and told him they had a warrant to search his car. He said there would be no need; he would do it himself. Thereupon he reached into the glove compartment, seized some contraband from it and fled on foot. The police gave chase, apprehended him and placed him under arrest. Thereafter they searched the car and found a quantity of narcotics.

On the record this is not a case where an arrest can be upheld on an independent showing of probable cause, even though the warrant turns out to be invalid. *See, e.g., United States* v. *White*, 342 F.2d 379, 381 (4th Cir.), *cert. denied*, 382 U.S. 871 (1965); *Williams* v. *United States*, 273 F.2d 781, 790 (9th Cir.), *cert. denied*, 362 U.S. 951 (1960). Here the evidence in support of the Commonwealth's alternative contention, the action of the defendant, was initially tainted by the invalid search warrant. That defect was not remedied by what occurred afterwards. *Cf. Wong Sun* v. *United States*, *supra*.

Affirmed.

APPENDIX B

OPINION

October 7, 1969

FORD, D.J.

Petitioner in this habeas corpus proceeding is now confined in the Barnstable House of Correction under a one year sentence imposed by the Massachusetts Superior Court upon his conviction, after a trial without jury, of possession of narcotics in violation of Massachusetts law. His conviction was affirmed by the Massachusetts Supreme Judicial Court, 1969 Mass. Adv. Sh. 559.

Petitioner, by motion to suppress in the trial court, and again in his bill of exceptions on appeal, has raised in the state courts the sole issue which he raises here, whether or not certain narcotics and related paraphernalia were lawfully seized during a search of his automobile on March 16, 1968. The trial court denied the motion to suppress and the evidence was admitted. It seems to be agreed that with this evidence, there was sufficient evidence to justify petitioner's conviction, and that without such evidence there would not have been sufficient evidence to convict.

The plaintiff's car was searched and the property in question was seized by Provincetown police acting under a search warrant issued on March 14, 1968 by the Second District Court of Barnstable, issued on the application and affidavit of police sergeant Meads. The factual basis for the issuance of the warrant was set forth in an attachment to the sergeant's affidavit which read as follows:

> "1. Information received from a confidential informant who is an admitted user and is known by me personally to associate with convicted narcotic users, and the informant admittedly associates with convicted users, who have past convictions for narcotic violations, and who has a user's knowledge of narcotics.

2. Information received by me from Detective Robert Silva, who has information from a reliable informant as to dates of parties and names of persons in attendance to conform with the same type of information received from my confidential informant.

3. And information received from State Police Connecticut Narcotics Agents, Trooper Hall and Trooper Reynolds that John Joseph Von Utter is known as associate with convicted narcotic users.

4. Information from my confidential informant that John Joseph Von Utter will be operating a white VW 2 door sedan, Connecticut registration JJVU in Provincetown some time between March 8-10, 1968 and will be containing a quantity of Marijuana, a Narcotic Drug and a quantity of Hallucinogenic Drug known as LSD (lysergic acid diethylamide).

5. All of the information received by me from my confidential informant has been confirmed by Narcotic Agents of the Massachusetts State Police and Connecticut State Police regarding the reputation of John Joseph Von Utter and the cars owner and description, color registration number."

It is petitioner's contention that the search warrant here did not justify the seizure because the warrant itself had been issued without probable cause. Whether or not there existed probable cause is a question to be settled solely on the basis of the facts set forth in the previously quoted attachment to Sergeant Mead's affidavit.

The court concludes that the affidavit, including its attachment, did not set forth sufficient grounds to afford a constitutional basis for a finding of probable cause. The facts here closely resemble those in *Spinelli* v. *United States*, 393 U.S. 410. The affidavit in that case set forth much more than the affidavit in this case in the way of background material including observations of Spinelli's

movements over several days and an assertion that Spinelli was known to law enforcement officers as a gambler and bookmaker and an associate of gamblers and bookmakers. All these, however, afforded no more than grounds for suspicion. The essential statement was that the FBI had been informed by a confidential, reliable informant that Spinelli was engaged in a certain apartment in operating a handbook and accepting wagers. This was held to be insufficient since the affidavit did not set forth facts to justify an inference that the informant could be considered generally trustworthy or to indicate how he came by the information he gave to the FBI.

Here the essential statement in the affidavit is contained in the fourth paragraph, i.e. that a confidential informant had given the affiant information that Von Utter would be in Provincetown in a certain car sometime between March 8-10, 1968 and would then have in the car marijuana and LSD. There is nothing to indicate how the informant purported to know this. He may have been told by Von Utter himself to expect him with narcotics at a specified time and place, or, as Spinelli points out, he might have been merely passing on a casual rumor circulating in the underworld. Nothing in the affidavit indicates on what facts the informant's statement was based.

Moreover, the affidavit does not set forth any factual basis to support a finding that the informant's tip was reliable. The statements that the informant was a drug user, an associate of drug addicts and familiar with their activities, shows, of course, that he was in a position where it was possible for him to acquire information about Von Utter's future activities. There is, however, nothing to indicate that the information he passes on is trustworthy. There is no statement that he has in the past given information which investigation showed to be true. There is an assertion that the affiant believes him to be reliable.

This is not enough. The decision whether or not to believe the tip is not for the officer but for the magistrate who issues the warrant. He must make the decision not by simply adopting the officer's conclusion, but upon facts set forth in the affidavit which justify the conclusion. *Johnson* v. *United States*, 333 U.S. 10, 14.

It is true that Von Utter did appear in Provincetown at least a few days after the informant said he would and in the car informant said he would be driving. But from the facts in the record we know this only because on March 16 the car was searched and Von Utter arrested in Provincetown. There is nothing in the affidavit to suggest that he had in fact arrived at the time the warrant was issued. Hence, this is not a case where, as in *Draper* v. *United States*, 358 U.S. 307, certain details of the informant's tip had been verified to the extent that it was reasonable to conclude that the remainder of his statement was probably true.

> "Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, *Jones* v. *United States*, 362 U.S. 257, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see *Rugendorf* v. *United States*, 376 U.S. 528, was 'credible' or his information 'reliable'. Otherwise, 'the inferences from the facts which lead to the complaint' will be drawn not 'by a neutral and detached magistrate' as the Constitution requires, but instead, by a police officer 'engaged in the often competitive enterprise of ferreting out crime', *Giordenello* v. *United States, supra,* at 486; *Johnson* v. *United States, supra,*

at 14, or as in this case, by an unidentified informant." *Aguilar* v. *Texas*, 378 U.S. 108.

The conclusion is that the affidavit here did not set forth facts to justify a finding of probable cause for the issuance of a search warrant. If nothing else was involved the further conclusion would be that the search was unjustified, and that petitioner's conviction on the basis of evidence uncovered by this search was in violation of his constitutional rights. Respondent urges, however, that even if the search was improper under the search warrant, it could still be justified as an incident to the arrest without an arrest warrant of Von Utter, which it is contended was justified. This contention appears to have been raised for the first time in this court. In the state courts the prosecution relied solely on the search warrant as justifying the search and seizure. Thus at the trial, while there was some testimony as to the circumstances of the arrest, the factual situation was not fully developed, and respondent urges that it should have an opportunity for a further factual hearing in the state court. It is doubtful whether in any event the state, having chosen to rely solely on the warrant, should be allowed at this late date to attempt to justify the search and seizure on different grounds. *Giordenello* v. *United States*, 357 U.S. 480.

In substance, it appears from statements of counsel that the state contends that on March 16, as Von Utter was walking from a drugstore toward his car, he was approached by police officers who told him they had a search warrant for the car, that Von Utter then grabbed certain contraband from the car and fled, and was immediately pursued and arrested. Assuming the arrest was lawful, it still does not appear to justify the search. Since Von Utter was arrested only after he had fled from the car, it is doubtful whether at the time of the arrest the car was within the narrowly circumscribed area to which a search

incident to an arrest may be lawfully extended. *Chimel* v. *California*, 395 U.S. 752.[1]

Respondent argues that Giordenello should not be followed here since special circumstances exist for following another course in this case. It is argued that *Spinelli* was decided after the trial of this case, and that the state should now be given a new opportunity to justify the search and seizure on other grounds. This argument would have merit if *Spinelli* represented a substantial change in the law of search and seizure which could not have been anticipated at the time the prosecution decided to rely on the search warrant. This is not the case, however. *Spinelli* represents no substantial change in the law, but is merely a particular application of principles which the Supreme Court had already enunciated several years before in *Aguilar* v. *Texas*, 378 U.S. 108.

The writ of habeas corpus will issue and respondent will be ordered to release the petitioner forthwith.

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[1] No contention seems to be made that any contraband seized on his person, as distinguished from what was seized from the car, would support the conviction, apart from the evidence seized in the search of the car.